

RECONCEIVING THE FOURTH AMENDMENT AND THE EXCLUSIONARY RULE

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I

INTRODUCTION

Mapp v. Ohio, decided in 1961, comprised two holdings.¹ The first, and more controversial at the time, applied the exclusionary rule to the states, overruling *Wolf v. Colorado*,² decided just twelve years before. But it was the second holding—“[A]ll evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in . . . court”³—that has led to the “criminal procedure revolution.” And it is the second holding that is currently under attack by the Supreme Court.

As a result of this second holding, the Supreme Court evidently felt compelled to set forth just what it was that the Constitution requires so that the police could follow the rules and avoid evidentiary exclusion. Thus it was that, in a series of cases through the 1960s and continuing to this day, the Supreme Court began the uniquely American practice of declaring “rules of criminal procedure” on a case-by-case basis,⁴ rather than through a comprehensive code.⁵ This is contrary to the practice of all other countries of which I am aware, including our common-law mentors, the British, who have nationally applicable codes of criminal procedure.⁶

It arguably follows from the American “rulemaking” practice, based as it is directly on the Constitution, that every search or interrogation violation is necessarily a violation of the Fourth or Fifth Amendments—and so the

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1. 367 U.S. 643 (1961).

2. 338 U.S. 25 (1949).

3. *Mapp*, 367 U.S. at 655 (emphasis added). The Supreme Court now dismisses this holding as “expansive dicta.” *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

4. See Craig Bradley, *Overview*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* xxi (Craig Bradley ed., 2d ed. 2007) [hereinafter *WORLDWIDE STUDY*].

5. For a discussion of why this is a bad way to make rules for police to follow, see generally CRAIG BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* (1993).

6. *WORLDWIDE STUDY*, *supra* note 4, *passim*.

Supreme Court has repeatedly assumed.⁷ Consequently, any evidence obtained in violation of the Constitution should be excluded, for it may seem logical that unconstitutionally obtained evidence should not be available to the government at trial. If, however, the rules of criminal procedure are based on a code, it does not seem so obvious that evidence obtained by violating some provision of it should not be available to the government at trial. Perhaps that is why, as the U.S. Supreme Court has observed, “the automatic exclusionary rule applied in our courts is . . . ‘universally rejected’ by other countries.”⁸

I have long supported the American mandatory rule. During my seven years as a federal prosecutor, including time as an Assistant United States Attorney in Washington, D.C., I could see that the rule’s mandatory nature forced police and federal agents to think about the rules before they acted. It caused both federal and local law-enforcement authorities to train their agents in the constitutional rules in order to afford evidentiary exclusion. In fact, my criminal procedure professor, Charlie Whitebread, was also the FBI’s criminal procedure professor. Nor was it my impression that any significant number of cases were lost as a result of the rule, especially prosecutions of violent felonies.⁹

Nevertheless, the Supreme Court has made it clear that it is dissatisfied with the mandatory aspect of the *Mapp* rule. In two recent cases, *Hudson v. Michigan*¹⁰ and *Herring v. United States*,¹¹ the Court has indicated that the rule should be changed but has stopped short of mandating a broad alteration. Although I oppose such a change, I do recognize that perfectly civilized and progressive countries in the world, as well as the European Court of Human

7. That is, in order for the Court to make a new “rule of criminal procedure,” it must find a constitutional violation in the case before it. *But see infra* notes 128–30 and accompanying text (discussing *Dickerson v. United States*).

8. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 344 (2006) (quoting Craig Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 399–400 (2001)). Recently, however, South Korea has adopted a mandatory exclusionary rule for violation of search-and-seizure rights. Honsasosongbop [Criminal Procedure Act] art. 308-2, as amended by Law No. 8730, Dec. 21, 2007 (S. Korea). But this is only if the seizure of the evidence violated the South Korean Constitution, as opposed to being in violation of the rules of procedure. *Id.* The United States has a similar nonexclusion policy with regard to searches that violate the regulations of the searching agency but not the Constitution. *United States v. Caceres*, 440 U.S. 741, 743 (1979).

9. For one thirty-day period as an AUSA, I handled all motions to suppress in misdemeanor cases for the entire city—about 100 cases. I won every one. At the time I attributed this to my great skill, as not all of the cases were obviously winnable. I have since realized that it probably had more to do with the reluctance of trial judges to suppress evidence in all but the most egregious cases. Nor can I recall losing a motion to suppress when I moved up to felony trials. Statistics quoted by the Supreme Court in *United States v. Leon*, 468 U.S. 897, 907 n.6 (1984) found a small percentage of cases affected by the rule, but the Court asserted that this “mask[ed] a large absolute number of felons who are released” because of the operation of the rule. *Id.* See generally Thomas Davies, *A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 1983 AM. B. FOUND. RES. J. 611.

10. 547 U.S. 586 (2006).

11. 129 S. Ct. 695 (2009).

Rights, do not feel that a mandatory exclusionary rule for search and seizure violations is necessary.¹²

In this article I discuss the *Hudson* and *Herring* decisions, the practices of other countries, and various previous suggestions for exclusionary-rule reform. Then, I set forth a reconception of the exclusionary rule, as well as the constitutional principles that gave rise to it. These reconceptions suggest a roadmap to exclusionary reform that might reconcile the factions on the Court (with Justice Kennedy in the middle) who strongly support and strongly oppose the current mandatory rule.

I propose that the exclusionary rule apply only in cases in which it can be said not only that the police broke the Fourth or Fifth Amendment rules, but that their conduct in doing so was negligent, judged case-by-case—in other words, when the search was “unreasonable,” which is all that the Fourth Amendment forbids. Such a change becomes possible if we think of the “rules” produced by the Supreme Court as being not manifestations of the Constitution, but rather rules in aid of constitutional rights. This approach will produce different results from the current law in three situations: (1) when police rely on Supreme Court precedent that the Court changes, when faced with the police’s actions, (2) when the law is unclear and the police make a reasonable guess as to what the appropriate standard should be, and (3) when the police wrongly, but reasonably, believe that the facts in their possession justified their acts. Currently all such cases lead to exclusion. Under this proposal, none of them would.

II

HUDSON AND HERRING: WHAT THE COURT SAYS NOW

A. *Michigan v. Hudson*

In *Hudson*, the police came to the defendant’s residence with a search warrant for drugs and firearms. They knocked and announced and then, without waiting for an appropriate period so that the suspects could answer the door, they burst into the house. The law at the time required that, to comply with the Fourth Amendment, the officers should have waited fifteen to twenty seconds before entering¹³ or should have been able to show a reasonable belief that knocking and announcing would be dangerous or futile.¹⁴

12. Apparently because of concern about false confessions, other countries tend to apply the exclusionary rule more often to confessions that do not conform to the rules. See Craig Bradley, *Interrogation and Silence: A Comparative Study*, 27 WIS. INT’L L.J. 271 (2009); *infra* part III.

13. *United States v. Banks*, 540 U.S. 31, 40–41 (2003).

14. 547 U.S. at 589–90 (citations omitted).

In an opinion joined by four Justices,¹⁵ Justice Scalia conceded that the police had violated the Fourth Amendment but held that, nevertheless, the evidence should not have been excluded at the trial. Terming the above holding of *Mapp* “expansive dicta,” the Court claimed that “suppression of evidence . . . has always been our last resort, not our first impulse.”¹⁶ Moreover, the Court declared that “but-for causality is only a necessary and not a sufficient condition for suppression.”¹⁷ In other words, even if the police would not have obtained the evidence but for the Fourth Amendment violation, the evidence did not necessarily have to be suppressed.

The Court went on to discuss why “knock and announce” violations in particular were not appropriate for evidentiary exclusion. First was the lack of a “but-for” connection between the violation and the finding of the evidence. That is, the police would have found the evidence here even if they had waited the appropriate period after knocking and announcing;¹⁸ therefore, the finding of the evidence was “attenuated” from the violation.¹⁹ The exclusionary rule is also inapplicable when the interest served by the knock-and-announce rule, the opportunity of the resident to “comply with the law and to avoid the destruction of property occasioned by a forcible entry,” had “nothing to do with the seizure of the evidence.”²⁰

Second, “the exclusionary rule has never been applied except ‘where its deterrence benefits outweigh its substantial social costs.’”²¹ Here, the cost—the exclusion of evidence—was not appropriate for what the Court obviously considered a trivial benefit. Moreover, application of the rule would over-deter the police. That is, “if the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires—producing preventable violence against officers in some cases, and the destruction of evidence in many others.”²² The Court claimed that civil remedies would be adequate to redress knock-and-announce violations.²³

Finally, in the portion of the opinion not joined by Justice Kennedy, the plurality claimed that three previous cases, *Segura v. United States*,²⁴ *New York*

15. Justice Scalia authored the opinion, joined by Chief Justice Roberts and Justices Alito and Thomas. Justice Kennedy concurred in most of the opinion and in the result. *Id.* at 587.

16. *Id.* at 591. In an appendix to his dissenting opinion, Justice Breyer cited forty-one cases decided between 1914 and 2003 in which evidence had been suppressed due to a Fourth Amendment violation. Accord Sharon Davies & Anna Scanlon, Katz in the Age of Hudson v. Michigan: *Some Thoughts on “Suppression as a Last Resort,”* 41 U.C. DAVIS L. REV. 1035, 1043 (2008) (declaring that the majority’s assertion “defies historical truth”).

17. *Hudson*, 547 U.S. at 592.

18. *Id.* at 593–94.

19. *E.g., id.* at 592–93.

20. *Id.* at 594.

21. *Id.* (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998)).

22. *Id.* at 595.

23. *Id.* at 597–98.

24. 468 U.S. 796 (1984).

v. Harris,²⁵ and *United States v. Ramirez*,²⁶ supported the conclusion “that suppression is unwarranted in this case.”²⁷ In *Segura*, the police illegally entered an apartment without a warrant and waited there for nineteen hours until the warrant arrived. Although the Supreme Court agreed that evidence found during the nineteen-hour period had to be suppressed, it allowed evidence seized after a search pursuant to the warrant to be used at trial under an “independent source” rationale.²⁸ That is, the police acting on the legally obtained warrant were “independent” of those who had entered illegally. Because the police behavior in *Segura* was worse than that in *Hudson*, the *Hudson* Court concluded that it would be “bizarre” to suppress the evidence in that case.²⁹

In *Harris*, the police made an illegal entry without a warrant to arrest the defendant. Although the Court held that any statements made or evidence seized inside the house must be excluded, it allowed defendant Harris’s subsequent statement at the station house to be admitted at his trial. The plurality declared that

“[Harris’ statement] was not the fruit of the fact that the arrest was made in the house rather than someplace else.” Likewise here: While acquisition of the gun and drugs was the product of a search pursuant to warrant, it was not the fruit of the fact that the entry was not preceded by knock-and-announce.³⁰

In other words, the “no but-for causation” argument, repeated.³¹

In *Ramirez*, the Court stated in dictum that destruction of property during an otherwise legal search might violate the Fourth Amendment but would not lead necessarily to evidentiary exclusion: “What clearer expression could there be of the proposition that an impermissible manner of entry does not necessarily trigger the exclusionary rule?”³² But as a practical matter, property destruction, if significant and unnecessary, could be the subject of a civil suit, with substantial attorney’s fees—unlike the violation in *Hudson*.

The bottom line for at least four Justices in *Hudson* is not just that the mandatory exclusionary rule has got to go, but that it is already gone. This was certainly news to the dissent, as well as to those of us who have taught Fourth Amendment law for many years.

In his concurring opinion, Justice Kennedy, the crucial fifth vote, “underscored” two points about the decision.³³ First, that “the court’s decision should not be interpreted as suggesting that violations of the requirement [to

25. 495 U.S. 14 (1990).

26. 523 U.S. 65 (1998).

27. *Hudson*, 547 U.S. at 599–600.

28. *Id.* at 600.

29. *Id.*

30. *Id.* at 601.

31. *See id.* Contrary to the result in *Hudson*, in both *Segurra* and *Harris*, the police did suffer the loss of some evidence as penalty for their illegal behavior.

32. *Id.* at 602.

33. *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

knock and announce] are trivial or beyond the law's concern."³⁴ But, of course, the opinion will have just the opposite effect. Because the police will now know that "knock and announce" violations will not be enforced by evidentiary exclusion and that civil suits will be useless to complain about the loss of twenty seconds of privacy, they will feel free to ignore the knock-and-announce requirement. Second, Kennedy adumbrated, "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt. Today's decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression."³⁵

This seemed an extraordinary statement, given all that Kennedy had agreed to in the majority opinion. The bottom line of *Hudson*, given Kennedy's reservations, is that four Justices made it clear they wanted to broadly reconsider the mandatory exclusionary rule, but a fifth was only agreeing that in the case of knock-and-announce violations, the rule would not be applied. Still, Kennedy's joining the opinion suggests that he also believed some sort of reconsideration of the rule was desirable.

B. *Herring v. United States*

The Court returned to the exclusionary rule two terms later in *Herring v. United States*,³⁶ in which it tried to establish a more-detailed approach as to when evidence would and would not be excluded. In *Herring*, the police in Coffee County, Alabama, arrested Herring based on information from a warrant clerk of neighboring Dale County, who had informed them that Herring was wanted for failure to appear on a felony charge. After his arrest, Herring was searched and a gun and drugs were found, which formed the basis of the federal charges against him. It turned out that the Dale County computer records were incorrect and that a warrant against Herring had been withdrawn five months before.

The evidence was nevertheless admitted against him and he was convicted. The Eleventh Circuit affirmed, finding that the arresting officers were "entirely innocent of any wrongdoing or carelessness" and that the error by the Dale County authorities was "negligent."³⁷ The Supreme Court affirmed Herring's conviction by a five-to-four vote in an opinion by Chief Justice Roberts, with Justice Kennedy offering no reservations. The Court's narrow holding is best summarized in the syllabus to the case: "When police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search, rather than systemic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply."³⁸

34. *Id.*

35. *Id.* at 603.

36. 129 S. Ct. 695 (2009).

37. *United States v. Herring*, 492 F.3d 1212, 1218 (11th Cir. 2007), *aff'd* 129 S. Ct. 695.

38. *Herring*, 129 S. Ct. at 697. All of this is in the opinion, it is just not stated as succinctly.

Contrary to *Hudson*, which seemed to suggest simply that one particular class of police behavior, no-knock entries with valid search warrants, would not be subject to the exclusionary remedy,³⁹ *Herring* holds that in each case there should be a separate inquiry into the culpability of the police. If the police error was due to “isolated negligence attenuated from the search,” the evidence will not be suppressed. If, on the other hand, there was “systemic error or reckless disregard of constitutional requirements,” the evidence will be excluded.⁴⁰

The difficulty is that this holding will not apply to most cases, despite the majority’s apparent attempt in dictum to dramatically limit the operation of the exclusionary rule. If the police conclude, for example, that exigent circumstances justify a warrantless entry of a home but the trial judge disagrees with them, should the evidence be suppressed or not? Since such a decision led directly to the search, it is not “attenuated,” even if negligent. Therefore, under the holding of *Herring*, the evidence should be suppressed, even though much of the opinion—suggesting that negligent errors by police are excusable—would indicate the contrary. Likewise, suppose the police decide that they have probable cause to search a car. The trial judge concludes that they lacked probable cause. Again, even if the trial judge concluded that their decision was not reckless, the evidence must be excluded because the Fourth Amendment violation is in no sense “attenuated” from the search.

The word “attenuated” dramatically narrows the holding in *Herring*. The term is likely present as the price of Justice Kennedy’s joining the opinion.⁴¹ If one reads the summarized holding without the phrase “attenuated from the search,” the remaining language in *Herring* comes much closer to what the rest of the opinion seems to be aiming at: not excluding evidence when the police violated the defendant’s Fourth Amendment rights either through simple mistake or negligence, and excluding evidence only when the police behavior was reckless or systematic.

It is not the purpose of this article to again critique the *Hudson* and *Herring* decisions in detail.⁴² Rather, the purpose here is to take seriously the view of five Justices that the exclusionary rule must be reconsidered and to come up with an approach that limits the rule without undermining all of the positive effects it has had on police training and behavior, albeit at the cost of some loss of evidence in criminal cases.

Viewing *Hudson* and *Herring* on their facts, without thinking about the implications for the future of Fourth Amendment law, a neutral observer would

39. Specifically no-knock entries with search warrants, *Hudson*, 547 U.S. at 591, along with the Court’s prior precedent—for example, search-warrant cases, *United States v. Leon*, 468 U.S. 897 (1984), and cases in which the police relied on an error by a court clerk, *Arizona v. Evans*, 514 U.S. 1 (1995).

40. *Herring*, 129 S. Ct. at 704.

41. Craig Bradley, *Red Herring or the Death of the Exclusionary Rule?*, TRIAL, Apr. 2009, at 52, 53.

42. *Id.*; Craig Bradley, *Mixed Messages on the Exclusionary Rule*, TRIAL, Dec. 2006, at 56, 56. Professor LaFave has dissected *Herring* from head to tail and declared it noisome. See generally Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule*, 99 J. OF CRIM. L. & CRIMINOLOGY 757 (2009).

probably agree with the outcome of both cases. After all, the violation in *Hudson* was unrelated to the finding of the evidence and was a very minor breach of the defendant's privacy. In *Herring*, the mistake was made, apparently in good faith, by a clerk in another police department—the arresting police were in no way at fault. Certainly a European or Canadian lawyer or judge would conclude that the evidence should not be suppressed in either case.

III

THE EXCLUSIONARY LAW IN OTHER COUNTRIES

A. Canada

Canada's 1982 Charter 9 (its constitutional document) actually contains an exclusionary rule. It provides that if evidence is obtained in a manner that infringes or denies any rights under the charter, the evidence must be excluded from a criminal trial if, "having regard to all the circumstances, the admission of it . . . would bring the administration of justice into disrepute."⁴³

Canada has a two-part approach to exclusion, the first being based on the fairness of the trial.⁴⁴ This is essentially mandatory, subject to an inevitable-discovery exception, and involves illegal "conscriptio" of the accused. "Conscriptio" means obtaining the defendant's cooperation in violation of Canada's version of the *Miranda* requirements, which includes informing the defendant not only that he has a right to counsel but that there is a duty that counsel be available to assist him. This exclusionary rule also applies to fruits of the poisonous tree of these violations.⁴⁵

The second part of the approach is to exclude any evidence whose admission might be seen as judicially condoning a "serious" violation of Canada's Charter. Whether a violation is "serious" "depends on whether the police violated the Charter deliberately or inadvertently." The seriousness of the violation is not mitigated by the conclusion that the police could have obtained the evidence otherwise, legally; and it can be aggravated if it is apparent "that the police could have done their job without violating the [rights of the] accused."⁴⁶ Violations committed in good faith are not considered serious, and good faith has been defined broadly "to include reliance upon legislation, warrants, policy directives, prior cases, legal advice or accepted practices . . . later found to be unconstitutional." Good faith does not include an officer's "subjective belief

43. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 24(2) (U.K.).

44. Kent Roach, *Canada*, in *WORLDWIDE STUDY*, *supra* note 4, at 71.

45. *Id.*

46. *Id.* (footnotes omitted). See generally EDWARD L. GREENSPAN & MARC ROSENBERG, MARTIN'S ANNUAL CRIMINAL CODE 2009 1791–95 (2008) for a summary of exclusionary law under the Charter.

that a search was authorized” if that belief is “based on unreasonable error” or the officer’s ignorance of the limits of his authority.⁴⁷

Thus, as to purely search-and-seizure violations, Canada uses a nonmandatory rule somewhat similar to what the Supreme Court seemed to be getting at in *Herring*: excluding evidence when police are “unreasonable” in reaching a good-faith conclusion that their actions are proper. Among the evidence that it has excluded under the second approach has been

drugs . . . seized by a choke hold when the police did not have reasonable grounds to believe that the accused was a drug handler; . . . drugs . . . seized through a defective warrant and a no knock entry with excessive force; . . . drugs . . . seized through an intrusive and unconstitutional rectal search; . . . drugs . . . seized after a trespass without reasonable grounds that the police ought to have known was illegal; . . . bloody clothes and other evidence in a murder case . . . seized after the police made a warrantless entry and arrest in the accused home without even a subjective belief that they had grounds for an arrest and engaged in a pattern of Charter violations; and [evidence found] when the police searched the pocket of a person subject to investigative detention for reasons not related to traffic safety.⁴⁸

In the 1997 case of *R. v. Feeney*, the court excluded evidence obtained when the police violated the Charter by making a warrantless entry and search of the accused’s trailer. The police based their suspicion on the presence of the accused near the scene of a murder, rather than on reasonable and probable grounds to arrest the accused for murder.⁴⁹ By suppressing the evidence, the Supreme Court of Canada changed the rule that warrantless arrests in the home were allowed on “reasonable and probable grounds” and required a warrant. The evidence would not have been suppressed if the police had relied *in good faith* on the law applicable at the time of the entry and search. Suppression was required “because the police admitted that they did not even subjectively believe they had grounds for an arrest when they entered the trailer.”⁵⁰

Before excluding evidence under the second test, the courts must consider the seriousness of the offense charged, the importance of the evidence sought to be excluded, and “the reactions of reasonable people under all the circumstances.”⁵¹ If the evidence is crucial to the prosecution’s case, the court will sometimes not exclude it, even though similar misconduct might lead to excluding less-critical evidence in another case.⁵² The accused has the burden of establishing that use of the evidence would bring the “administration of justice into disrepute.”⁵³

47. Roach, *supra* note 44, at 71.

48. *Id.* at 72 (footnotes omitted).

49. [1997] 2 S.C.R. 13 (Can.).

50. Roach, *supra* note 4, at 64.

51. *Id.* at 72.

52. *Id.* at 72.

53. *Id.* at 73. But see *Hunter v. Southam, Inc.*, [1984] 2 S.C.R. 145 (Can.), a civil case in which the court held that if a building is searched without a warrant when one was feasible, the burden shifts to the government to establish that the search was not unreasonable.

Thus, though Canada has strict rules regarding interrogations and a tough exclusionary policy for violating those rules, its search-and-seizure rules, while similar to ours, are not backed by tough mandatory exclusion. Because questionable evidence has ultimately been excluded in a number of cases, however, the nonmandatory rule is apparently being invoked often enough to deter some negligent or “unreasonable” behavior by the police.

Two recent Canadian Supreme Court cases cast some further light on Canada’s approach to the exclusionary rule. In *R. v. Harrison*,⁵⁴ an Ontario policeman activated his roof lights to stop a van for having no front license plates. He then realized that the van was from Alberta, which did not require front plates. He stopped the van anyway and found that the driver was driving with a suspended license. A search incident to the driver’s arrest then revealed thirty-five kilograms of cocaine. The policeman testified that he had stopped the van despite its lawful plates because “abandoning the detention would have affected the integrity of the police in the eyes of observers.”⁵⁵ The trial court disbelieved his testimony and concluded that the police (for unstated reasons) had suspected the van’s driver all along.

The trial judge concluded that the police had seriously violated the Charter but admitted the cocaine nevertheless. The Supreme Court disagreed on the ground that the Charter breach by the police was “reckless and showed an insufficient regard for Charter rights.”⁵⁶ It ordered the defendant’s conviction reversed. Although this evidence would also have been suppressed in America,⁵⁷ it is doubtful that many American courts would have found this violation “reckless,” given the relatively minor Fourth Amendment breach and (though it is supposed to be irrelevant) the large amount of cocaine found.

In *R. v. Grant*,⁵⁸ the police, with no reasonable suspicion, cornered the defendant on the sidewalk such that he would not feel free to leave. They then asked him if he had a gun; he admitted that he did. They seized it and convicted him of firearms violations. Although the Canadian Supreme Court reversed the conviction for technical reasons, it concluded that the admission of the gun was proper, despite the Charter violation that led to its discovery. The court found that the “police conduct was neither deliberate nor egregious and there was no suggestion that the accused was the target of racial profiling or other discriminatory police practices.”⁵⁹

The court applied a new three-part test to determine if exclusion was appropriate: “(1) the seriousness of the Charter-infringing state conduct . . . (2) the impact of the breach on the Charter-protected interests of the accused . . .

54. [2009] 309 D.L.R. 87 (Can.).

55. *Id.* at ¶ 5.

56. *Id.* at ¶ 24.

57. See *Delaware v. Prouse*, 440 U.S. 648 (1979) (requiring reasonable suspicion to stop a car).

58. [2009] 309 D.L.R. 1 (Can.).

59. *Id.* at intro.

and (3) society's interest in the adjudication of the case on its merits.”⁶⁰ The court stressed that these factors do not refer to any adverse reaction to the exclusion of evidence in any particular case, but rather to whether “the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence.”⁶¹ Finally, the court noted that “good faith” on the part of the police would also reduce the need for exclusion, but “ignorance of Charter standards must not be rewarded or encouraged and *negligence* or willful blindness cannot be equated with good faith.”⁶²

Taking these factors into account, and noting that “the gun is highly reliable evidence,”⁶³ the court upheld the trial court's refusal to exclude the evidence. The different results in these two cases seem inconsistent. Both cases involved a stop without reasonable suspicion and, without further breach of the rules by police, the seizure of real evidence. Moreover, a showing that police were negligent as to Charter standards would appear be a significant factor leading to exclusion. Nevertheless, these cases do show that the Canadian courts are wrestling with the issue of exclusion.

B. England and Wales

England, like Canada, has tough interrogation rules and applies tough exclusionary principles to their violation.⁶⁴ When it comes to search and seizure, however, “that evidence has been obtained by unlawful or improper means does not necessarily (or, except in relation to confessions, even usually)” require its exclusion at trial.⁶⁵ Trial judges have discretion to exclude evidence obtained in the course of a search “if in all circumstances admitting it would make the proceedings unfair.”⁶⁶ Although there are examples of such exclusion at the trial and appellate levels,⁶⁷ Britain's highest court, the House of Lords—unlike the Canada Supreme Court—has not developed a body of search-and-seizure cases in which the exclusionary remedy has been applied, and no guidelines for exclusion exist.

Perhaps more likely to further the development of the exclusionary rule in England (and in the rest of Europe) is the decision of the European Court of

60. *Id.* at ¶ 71.

61. *Id.* at ¶ 68.

62. *Id.* at ¶ 75 (emphasis added).

63. *Id.* at ¶ 139.

64. “Failure to caution a suspect and wrongful refusal of access to legal advice are serious and substantial breaches” that lead to exclusion. David Feldman, *England*, in *WORLDWIDE STUDY*, *supra* note 4, at 172. However, England also has “The English Warning” that a defendant's failure to respond to questions may be used against him if inconsistent with his defense at trial. *Interrogation and Silence*, *supra* note 12, at 285.

65. Feldman, *supra* note 64, at 163.

66. *Id.* (referring to The Police and Criminal Evidence Act (PACE), 1984, c. 60, § 78 (Eng.)).

67. *See, e.g.*, DPP v. Godwin, (1991) R.T.R. 303 (Q.B.) (Eng.) (excluding evidence from breathalyzer test when police lacked reasonable cause to stop motorist); R v. Fennelley [1989] Crim. L.R. 142 (excluding evidence when an officer failed to comply with the requirement that he tell the suspect why he was being arrested and searched).

Human Rights in *Khan v. United Kingdom*.⁶⁸ In that case, Khan visited a friend, B, who was already under investigation for dealing in heroin. The South Yorkshire police had planted an electronic bug in B's house, which violated the European Convention on Human Rights. Khan was recorded telling B that he was a coconspirator in drug smuggling. Khan moved to suppress the recording on the ground that the bug was illegally planted. The Crown admitted that there was no domestic statutory system to regulate police use of electronic listening devices. Khan was convicted solely on the basis of the tape, and the Court of Appeals and the House of Lords each upheld his conviction. The House of Lords agreed with the defendant that the surveillance had violated Article 8 of the European Convention on Human Rights, which prohibits police from intruding into certain private matters.⁶⁹ Nevertheless, noting that the recording did not violate British law, the Lords upheld the trial judge's finding that its use did not render the trial unfair.⁷⁰

The European Court of Human Rights agreed with Khan that the South Yorkshire police had violated Article 8.⁷¹ That the questioned evidence was essentially the government's whole case was not determinative, the court noted, since "there was no risk [of the evidence] being unreliable."⁷² Likewise, the court concluded by a vote of six to one that the trial was "fair" under the Convention and that the evidence need not have been excluded. The court summarized its position, stating,

[I]t is not the role of the court to determine as, a matter of principle, whether particular types of evidence—for example unlawfully obtained evidence—may be admissible or, indeed, whether the applicant was guilty or not. The question . . . is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.⁷³

Thus the court rejected the use of a mandatory exclusionary rule in cases concerning a violation of the Convention.

C. France

French rules regarding search and seizure seem disturbingly vague by American standards. For example, there is no search-warrant requirement for dwellings. In serious-offense cases, the police may "enter and search the domicile of all 'persons who appear to have participated' in the offense or 'to be in possession of papers or objects relating to' the crime, and seize any evidence

68. 31 Eur. Ct. H.R. 45, (2001).

69. *R. v. Khan*, [1997] A.C. 558 (H.L.). Article 8 provides in § 1 that "[e]veryone has the right to respect for his private life and his correspondence" and in § 2 that "[t]here shall be no interference by public authority with the exercise of this right except such as in accordance with law and is necessary in a democratic society. . . . For the prevention of disorder or crime. . . ." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5.

70. [1997] A.C. 558 (H.L.).

71. *Kahn*, 31 Eur. Ct. H.R. 45, para. 28.

72. *Id.* at para. 37.

73. *Id.* at para. 33.

‘useful to the manifestation of the truth.’”⁷⁴ No particular level of suspicion is required, though there are limitations as to time of entry, the presence of a witness, and special provisions designed to protect confidential information.⁷⁵ To the extent that domicile searches are regulated, however, French law applies a mandatory exclusionary rule to all wrongly obtained evidence, as well as to violations regulating identity checks and wiretaps.⁷⁶ But only those violations “deemed to have violated ‘substantial’ provisions of the code or other laws related to criminal procedure” lead to the exclusion of evidence. Which procedural rules are so “substantial” as to merit recognition is within the court’s discretion. Courts must find, further, “that the violation has caused ‘harm to the interests of the party that it concerns.’”⁷⁷ Both mandatory and discretionary exclusion may also result in exclusion of the fruits of the poisonous tree and are not limited by principles of standing.⁷⁸

D. Germany

Germany—like Canada, England, and France—is tough on interrogation violations; but, compared to America, Germany is lax on evidentiary exclusion for search-and-seizure violations. Germany insists that it has no mandatory rule except as to confessions obtained by violence, threats, hypnosis, or, surprisingly to Americans, deception.⁷⁹ Otherwise, in each case the interests of the state in prosecution must be balanced against the suspect’s rights. Still, the Federal Court of Appeals has explicitly recognized that “a functioning system of criminal justice must exist in a state based on the rule of law (*Rechtsstaat*).”⁸⁰

Consequently, German courts have held that certain violations “normally” will result in exclusion, including confessions obtained without the proper Miranda-type warnings and those confessions for which access to counsel prior to interrogation was denied.⁸¹ By contrast, “the fruits of illegal searches are usually held admissible.”⁸² But German courts do consider the extent to which the evidence impinges on the defendant’s private sphere; thus evidence from diaries, from the files of a drug treatment clinic, and from the bugging of a private home have been held inadmissible, sometimes regardless of the legality of seizure, depending on the seriousness of the case.⁸³

74. Richard S. Frase, *France*, in *WORLDWIDE STUDY*, *supra* note 4, at 211 (quoting CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 54 (Fr.)).

75. *Id.*

76. *Id.* at 212.

77. *Id.* at 212–13 (quoting C. PR. PÉN. art. 171).

78. *Id.* at 213.

79. Thomas Weigand, *Germany*, in *WORLDWIDE STUDY*, *supra* note 4, at 251. Such statements are presumed involuntary. *Id.* at 258.

80. *Id.* at 251.

81. *Id.*

82. *Id.* at 252.

83. *Id.* and cases cited therein. See Craig Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032 (1983) (discussing German exclusionary principles in detail).

Germany's exclusionary rule is nonmandatory; nevertheless, the Federal Court of Appeals recently ordered the suppression of evidence found in the defendant's apartment due to the failure of police to obtain a search warrant.⁸⁴ The police arrested the suspect at four o'clock in the afternoon, and then waited until eight o'clock that night to search his home, arguing that by then it was too late to get a warrant. The court held that evidence will be excluded if the police or the prosecutor intentionally or "arbitrarily" (that is, based on a clear violation of standard procedures) disregards the warrant requirement. The court rejected the government's "inevitable discovery" argument on the ground that it would encourage the police to ignore the warrant requirement.⁸⁵

So why do these other countries seem to care less about search violations than interrogation violations—leaving aside involuntary confessions, which are always punished by mandatory exclusion? And why do they care less about search violations than Americans? Certainly the interference with one's privacy occasioned by an illegal search of one's home or, especially, by an unjustified arrest is far worse than the failure to receive proper *Miranda* warnings.

Professor Kent Roach observes that the Canadian nonmandatory rule was written specifically with (rejection of) the American mandatory rule in mind, but does not opine on the reason for the difference.⁸⁶ Professor David Feldman points to England's common-law tradition of nonexclusion on the ground that exclusion of relevant evidence makes the trial less reliable, but notes that this has recently given ground to the nonmandatory rule because of "concerns about police malpractice."⁸⁷ But like Roach, Feldman can point to no differences between England and America to explain the different rules.

Professor Richard Frase points to several factors about France that might be relevant:

Continued strong belief in the inquisitorial search for the truth . . . The French don't have as explicit a constitutional guarantee in this area; even the European Convention text is more vague on this than the Fourth Amendment . . . Continuing deference to the police—especially officers of the traditional police—who conduct most of these operations.⁸⁸

I doubt whether the attitude of Americans as a whole toward evidentiary exclusion differs much from those of the citizens of these other countries. Most would probably agree that evidence should be suppressed only when police behavior flagrantly violates the rules. I suspect that the Supreme Court's adoption of the rule in *Mapp* was a stringent effort to protect racial minorities from police overreaching, rather than a reflection of American attitudes toward

84. Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 18, 2007, 51 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 285 (F.R.G.).

85. *Id.*

86. E-mail from Kent Roach, Prichard-Wilson Chair, Faculty of Law, University of Toronto to author (Apr. 20, 2009) (on file with *Law and Contemporary Problems*).

87. *Id.*

88. *Id.*

police behavior.⁸⁹ As other countries have grown more ethnically diverse, evidentiary exclusion has become more common, but only in Canada does it seem common enough to have any effect on deterring police misconduct, though Germany may be headed in that direction. It remains an interesting question why other countries seem to be at least as concerned about interrogation violations as we are, but less concerned, at least legally, about search-and-seizure violations.

The structure of American criminal procedure seems to have played a part in the development of the mandatory exclusionary rule.⁹⁰ As adumbrated by the Supreme Court in *Weeks*, and reiterated in *Mapp*,

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution.⁹¹

It does not seem particularly obvious that every violation should lead to exclusion. If the police have simply violated a code of procedure implicating no constitutional rights, exclusion of evidence might not be called for. If, on the other hand, that violation does infringe on constitutional rights, then exclusion of evidence seems to follow more logically.

IV

ALTERNATIVE PROPOSALS

The exclusionary rule has been rethought many times. Wigmore offered the first major criticism of the rule shortly after it was declared by the Court in *Weeks*:

[The exclusionary rule] puts . . . [c]ourts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the overzealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer. . . . [T]he forces of criminality, fraud, anarchy, and law evasion perceived the advantage [of the rule] and made vigorous use of it. . . . [T]he judicial excesses of many [c]ourts in sanctioning its use give an impression of maudlin compliance which would be ludicrous were it not so dangerous to the general respect for law and order in the community.⁹²

Accordingly, Wigmore proposed both civil suits and criminal prosecution of police as a remedy for Fourth Amendment violations.⁹³

Forty years later, John Kaplan proposed limiting the exclusionary rule to “non-serious” crimes.⁹⁴ Thus, for murder, treason and espionage, armed

89. Though this does not explain the original application of the rule to federal authorities in *Weeks v. United States*, 232 U.S. 383 (1914). See Michael Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

90. *E-mail*, *supra* note 86; see *supra* part II.

91. 232 U.S. 383, 393 (1913); 367 U.S. 643, 646 (1961).

92. John H. Wigmore, *Using Evidence Obtained by an Illegal Search and Seizure*, 8 A.B.A. J. 479, 480–82 (1922). The identical language appears in 4 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2184 (2d ed. 1923).

93. Wigmore, *Using Evidence*, *supra* note 92, at 484.

robbery, and kidnapping by organized groups, exclusion would occur only if the police engaged in “conscience shocking” behavior.⁹⁵ Kaplan would not have applied the rule “to cases where the police department in question has taken seriously its responsibility to adhere to the fourth amendment,” as reflected by

a set of published regulations giving guidance to police officers as to proper behavior in situations such as the one under litigation, a training program calculated to make violations of the fourth amendment rights isolated occurrences, and, perhaps most importantly, a history of taking disciplinary action where such violations are brought to its attention.⁹⁶

In other words, if the police usually made a good-faith effort to follow the Fourth Amendment, even if the officers blatantly ignored Fourth Amendment restrictions, the evidence should not be excluded unless police behavior “shocked the conscience,” as it might if they physically abused the subjects of the search.⁹⁷

If, under Kaplan’s scheme, the burden were on the government to prove the police’s good-faith effort to comply with the Constitution, and if this burden were met, it would suggest that, overall, compliance was high and exclusion unnecessary since deterrence was being achieved in general, if not in any one case. An overall practice of police compliance would be equally desirable, however, and apparently exists to some extent under the current mandatory rule. Yet a mandatory rule does not seem to have stopped illegal searches. A scheme based on the notion that “we’ll let you get away with it this time” does not seem as effective. Nor does the same scheme with the burden placed on the defendant to disprove good faith, for it would be very difficult for him to show a pattern of violations to demonstrating that the police preventive measures were not working.

In reply to Kaplan’s argument that the exclusionary rule should not be applied in cases of “serious” crimes,⁹⁸ Yale Kamisar has pointed out that this would give a prosecutor the power to avoid the exclusionary remedy simply by charging the defendant with such a serious crime. For example, a prosecutor might charge a defendant with murder even though, without the illegally seized evidence (or even with it), the most that he could prove was manslaughter.⁹⁹ More generally, why should police be excused from penalty for violations in those serious cases in which they are most likely to want to commit them? And, as Kamisar notes, the temptation to expand the category of “serious” crimes will likely be overwhelming.¹⁰⁰

94. John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974).

95. *Id.* at 1046.

96. *Id.* at 1050–51 (footnotes omitted).

97. *Id.* at 1046. *Rochin v. California* first established the “shocked the conscience” test in the due process context. *Rochin v. California*, 342 U.S. 165, 172 (1952).

98. Kaplan, *supra* note 4, at 1047.

99. See Yale Kamisar, “Comparative Reprehensibility” and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1, 12 (1987).

100. *Id.* at 17–18.

The Model Code of Pre-Arraignment Procedure suggests a different approach, not unlike approaches used by other countries, focusing on many circumstances.¹⁰¹ The Code would have the trial judge consider the importance of the evidence, the magnitude and willfulness of the police violation, “the extent to which exclusion [would] tend to prevent violations of this Code,” whether there was a “but for” relationship between the evidence and the violation, and “the extent to which the violation prejudiced the moving party’s ability to support his motion or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.”¹⁰²

Kaplan rejected this approach as “unadministerable.”¹⁰³ Because some of the factors do not seem to make much sense, he is likely correct. But if we view the test as just telling the trial judge to consider all relevant factors, as other countries do, it is not so much “unadministerable” as conferring huge discretion on the trial judge. Judges who are so inclined will virtually always be able to line up the various factors in favor of nonexclusion, as seems to be done in England.¹⁰⁴ The whole point of the exclusionary rule must be that it compels judges in certain cases, including some cases that do not involve outrageous police conduct, to go against their tendency to make all evidence available to the jury, and to exclude evidence in order to encourage the police to follow the rules in the future.

For example, in the next few months there will undoubtedly be police who will follow the old auto-search rule of *New York v. Belton*,¹⁰⁵ rather than the new rule of *Arizona v. Gant*.¹⁰⁶ That is, they will search the passenger compartment of a car upon the arrest of the driver without any reason to believe that evidence might be found. In some cases, police will find incriminating evidence. Assume that police unaware of the new rule in *Gant* find evidence of a felony. A court applying a balancing test, like that in the Model Pre-Arraignment Code, would note that the police were unaware of the new rule, that the intrusion on the defendant’s Fourth Amendment rights was relatively minor, and that such a minor intrusion had in fact been legal until recently. The court would probably admit the evidence. Such a practice would encourage police departments not to bother to make sure that their officers are aware of recent Supreme Court decisions, but to simply slouch along, conducting business as usual.

101. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §150.3 (statements), § 290.2 (seized evidence) (1975).

102. *Id.* §150.3; see also William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1385 (1981) (discussing various proposals to alter or eliminate the exclusionary rule).

103. Kaplan, *supra* note 94, at 1048 n.106.

104. Few if any judges will be inclined to virtually always favor exclusion, but might be more inclined to do so in close cases.

105. 453 U.S. 454 (1981).

106. 129 S. Ct. 1710 (2009).

Another prominent critic of the exclusionary rule is Judge Richard Posner. His solution is civil suits, though he concedes that juries will be “unsympathetic” to the claims of guilty defendants.¹⁰⁷ Like the Supreme Court in *Hudson*, he seems to think that class-action lawsuits against police departments that have systematic policies of performing illegal searches in particular neighborhoods would be sufficient to deter police misconduct. Although civil suits might suffice to deter *that kind* of police misconduct, they would do nothing for the average suspected drug possessor who had been subjected to an illegal frisk, car search, or arrest.

Of course, as Posner argues, we do not care about the defendant in a particular case. Why should “the criminal . . . go free because the constable . . . blundered,” as Judge Cardozo put it.¹⁰⁸ The reason for exclusion is to deter the police from doing this all the time. If we offer the defendant only the specious opportunity to bring a civil suit,¹⁰⁹ there will be nothing to discourage the police from illegally searching the next defendant, and the next thousand as well, as long as they do so on an individual basis (as they generally do) rather than as part of a preconceived departmental plan. Civil suits are a worthwhile adjunct to exclusion: exclusion does not help victims of police illegality who are in fact, innocent, but civil suits do when substantial injury has occurred. Suits do not help guilty victims of police misconduct, as Posner concedes,¹¹⁰ but exclusion does. The two combine to deter police misconduct if applied on a regular enough basis that police will consider the realistic threat of penalty before acting.

The bottom line of all of the alternative remedies suggested over the years is that their use is not so likely that they would have a significant deterrent effect on police. If a jurisdiction were to establish a police-review board that would consistently punish wayward officers and compensate victims of police abuse of constitutional rights, regardless of the victim’s guilt, then we should seriously

107. Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 59. Akhil Amar likewise promotes various civil remedies as the only proper approach. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 40–43 (1997). *But see* Herring v. United States, 129 S. Ct. 695, 707 (2009) (Ginsburg, J., dissenting) (“Civil liability will not lie for the ‘vast majority of Fourth Amendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice.’”) (quoting Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1389 (1983)).

108. *People v. DeFore*, 150 N.E. 585, 587 (N.Y. 1925), *cert. denied*, 270 U.S. 657 (1926).

109. Civil suits are a specious remedy not only because guilty defendants are unlikely to win, but because most Fourth Amendment violations do not cause substantial, financially quantifiable damage to their victims. What are the damages for a warrantless search of one’s home when the police have probable cause and could have gotten a warrant? Because attorney’s fees are limited to 1.5 times the actual damages incurred, civil suits are an ineffective deterrent. *See Term in Review*, 75 U.S.L.W. 3089, 3090 (2006) (summarizing Yale Kamisar’s remarks referring to the Prison Litigation Reform Act’s limits on attorneys’ fees).

110. Posner, *supra* note 107, at 59–60.

consider doing away with the exclusionary rule.¹¹¹ There is no reason not to put such a body into place now. But the proponents of various alternative remedies want to abolish the rule now and hope that something will spring up that will magically take its place.

V

THE SUPREME COURT'S PROPOSAL

Now the Supreme Court has joined the ranks of those who believe that the mandatory exclusionary rule must be reconsidered. The apparent view of four of the members of the *Herring* majority is *that evidence should be suppressed only when the violation of the Fourth Amendment by police is reckless or systemic*.¹¹² As the majority opinion put it, “[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence,”¹¹³ as if this were already the rule. In short, the exclusion decision should be based entirely on the culpability of the police without regard for any other factors, such as the nature or importance of the evidence in question, the seriousness of the case, or any other factors considered in the balance by other countries when making the exclusionary decision. If the purpose of the exclusionary rule is to deter police misconduct, as the Court declares that it is,¹¹⁴ then these other factors are irrelevant. The Court is correct to focus on this issue. Allowing courts to consider *all* factors makes it too easy to find a way to admit questionably obtained evidence.

What these various terms of culpability mean is pertinent to the feasibility of any proof of misconduct. “Reckless” conduct is “[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk.”¹¹⁵ Negligence is “[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm”¹¹⁶ Police are “reckless” if they consciously disregard a substantial and unjustifiable risk that their conduct violates the Fourth Amendment. They are negligent if they fail to exercise a degree of concern toward Fourth Amendment rights that a reasonable and prudent police officer would have exercised.

111. See Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (proposing a new system of damages specifically aimed at dealing with constitutional violations by police).

112. See *supra* part II.B (discussing the *Herring* opinion).

113. *Herring*, 129 S. Ct. at 702.

114. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

115. BLACK'S LAW DICTIONARY 1385 (9th ed. 2009).

116. *Id.* at 1133.

Unfortunately, the Court leaves out a particularly significant element: the burden of proof.¹¹⁷ Yet, this is critical. If the defendant is expected to prove the recklessness of the police before evidence can be excluded, which the Court seems to assume,¹¹⁸ it will be a rule of nonexclusion. How is the defendant, typically represented by a publicly paid attorney, expected to prove not just that the police violated the Fourth Amendment, not just that they did not behave as reasonable policemen, but that they acted either in “conscious disregard of a substantial and unjustifiable risk” that their conduct violated the Fourth Amendment, or were grossly negligent? It will be virtually impossible. Even if the burden is placed on the state to prove nonrecklessness; however, it is unlikely that the defendant would prevail.

Imagine a typical cross-examination:

Q. Officer, you searched the defendant’s house without obtaining a search warrant, is that correct?

A. Yes.

Q. Are you aware of the warrant requirement?

A. Yes.

Q. What does it require?

A. It requires that I get a search warrant before I can search someone’s house unless I got exi . . . umm, exi . . . Unless it’s an emergency.

Q. And what were the exigent circumstances here?

A. Well, we knew that the defendant sold heroin from his house and we were afraid that if we waited for a warrant it would all be gone.

Q. But officer, you had no knowledge of how much he had or how fast it was likely to be gone, did you?

A. No sir. But we know that it sells like hotcakes in this neighborhood.

Q. Did you surveil the defendant’s house and see lots of people apparently going there to buy heroin?

A. No sir.

Is this a Fourth Amendment violation? Clearly it is, even assuming that the police had probable cause that the defendant was selling heroin from his house. They had no substantial basis for acting without a warrant.¹¹⁹ But did they act in “conscious disregard” of the warrant requirement? Even if the burden is on the

117. The Supreme Court has never clarified this issue with respect to motions to suppress, except in warrant cases, in which the defendant must establish that the police did not act in good-faith reliance on a legally issued warrant. 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.2(b) (1978).

118. When the Court states that “to trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it,” *Herring*, 129 S. Ct. at 702, it seems to assume that the defendant must establish this. Otherwise, the principle would be stated: “to avoid triggering exclusion, the violation must be shown to be less than reckless or systemic,” or with words to that effect.

119. See, e.g., *Johnson v. United States*, 333 U.S. 10 (1948).

government, the answer is likely no. Only if the defense could show that this police department systematically disobeyed the warrant requirement or that the police officer “consciously disregarded” it could evidence be suppressed in this case.

Because ignorance of the law makes its “conscious disregard” impossible, police departments would be encouraged to not train their officers, and Fourth Amendment compliance would dramatically decrease—the very problem that led to *Mapp*’s adoption of the mandatory rule. Further, the Court’s new standard for applying the exclusionary rule makes it even more difficult to apply than the current standard for warrant cases. As spelled out in *United States v. Leon*, the test is whether the officer acted in “reasonable good faith” in relying on a defective search warrant—a negligence standard.¹²⁰

VI

A RECONCEPTION OF THE EXCLUSIONARY RULE

This article’s purpose is to come up with a new approach, not to defend the current mandatory rule. And this “new approach” is to be found in the old words of the Fourth Amendment. It forbids only “unreasonable searches and seizures.” Negligence is “unreasonable.”

Until now, the Court has set forth classes of cases, such as searches of houses and searches of cars. Then it has established the requirements for those searches to be considered “reasonable.” Warrants based on probable cause are required for houses, probable cause alone for cars, and only “reasonable suspicion” for frisks. If a given search does not meet the appropriate criterion, it is “unreasonable” by definition, without considering the culpability of the police. This has been, until *Hudson*, subject to only two exceptions: cases in which the principal violation was by a party other than the police and cases in which the forum where the evidence was to be used was not a criminal trial.¹²¹

Now the Court is proposing to engage in a two-part inquiry in every case, considering first whether there was a breach and second whether the level of police culpability was reckless or systematic. This is similar to what is currently done in search-warrant cases under *United States v. Leon*. It will make trials more drawn out and complicated. And the answer will virtually always—absent uncharacteristic admissions of culpability by police—be nonexclusion. If we must engage in a second inquiry, the proper test can be found in the terms of the Fourth Amendment: If the police are negligent, they are, by definition “unreasonable,” and if the search is unreasonable, it violates the Fourth Amendment on its face. Therefore, the evidence should be excluded in cases of police negligence.

120. “[O]ur good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization.” *United States v. Leon*, 468 U.S. 897, 923 n.23 (1984).

121. *See Hudson v. Michigan*, 547 U.S. 586, 611–12 (2006) (Breyer, J., dissenting).

This may not seem so different from the current system, but it is, in fact, a dramatic change. Currently, trial courts do not consider whether a policeman's conclusion that he had probable cause to search a car, or enter a house without a warrant, was "reasonable." If the trial judge concludes that the officer did not have probable cause and that exigent circumstances were absent, the evidence is out, even though the judge might conclude that the policeman made a "reasonable" mistake in concluding that he had the requisite level of suspicion to justify his actions.¹²²

It is these cases that are most galling to conservatives. Consider, for example, Justice Rehnquist's dissent from the denial of a stay in *California v. Minjares*,¹²³ in which he laid out his objections to the exclusionary rule. In *Minjares*, the police stopped a car with probable cause that it had been involved in a robbery. After searching the passenger compartment of the car and finding nothing, the police opened the trunk and found and opened a tote bag containing evidence. The California Supreme Court reversed the conviction and ordered the evidence suppressed on the ground that the warrantless search of the bag was impermissible, though the policeman would have had no way of knowing that this was how the case would be decided.¹²⁴ Obviously the policeman's behavior was "reasonable," even if wrong. Therefore, under this approach, not only should the evidence *not* have been suppressed, but *there was no Fourth Amendment violation at all*. The police made a mistake, but it was a reasonable mistake.

Even more galling to conservatives is a case like *Arizona v. Gant*, in which the police simply followed the then-governing precedent of *New York v. Belton* in searching, with no reasonable expectation of finding evidence, the passenger compartment of defendant's car after he was arrested for driving on a suspended license. If the purpose of the exclusionary rule is to deter police misconduct by punishing them for violating Fourth Amendment, then it makes absolutely no sense to exclude evidence when police were following current, clearly established law.¹²⁵ *Gant* should have declared a new rule that would have permitted admitting the challenged evidence in that case.

The Supreme Court employed similar reasoning in *Herring*. Clearly, the arresting officers were not negligent and therefore did not violate the defendant's rights. *Herring* hinges on a separate question: How far to cast the net of exclusion when someone in the employ of the police has acted

122. See *Vale v. Louisiana*, 399 U.S. 30 (1970) (holding that evidence obtained when police had erroneously claimed exigent circumstances to enter a house must be suppressed).

123. 443 U.S. 916, 916–17 (1979) (Rehnquist, J., dissenting, joined by Burger, C.J.).

124. *Id.* at 919. Compare *Robbins v. California*, 453 U.S. 420 (1981) (agreeing with the California Supreme Court in a similar case), with *United States v. Ross*, 456 U.S. 798 (1982) (overruling *Robbins* as well as, in effect, the California Supreme Court's conclusion in *Minjares*).

125. Of course, the most galling case of all was *Miranda v. Arizona*, 384 U.S. 486 (1966), in which in the course of investigating a rape, the police obtained an apparently voluntary confession from the suspect after two hours of interrogation. The confession was excluded on the ground that the defendant had not been informed of his right to counsel when this warning requirement did not yet exist.

negligently. It is preferable to draw a clear line between mistakes by the police in general and mistakes by other agencies,¹²⁶ for, as Justice Ginsburg pointed out in dissent, the police's negligent mistakes can and should be deterred by exclusion.¹²⁷ Yet *Herring* encourages the police to make clerical "mistakes" when they want to arrest someone, though technically of course, such purposeful manipulation is forbidden.

This article is a "reconception" because it completely changes the relationship between the Fourth Amendment, the rules of criminal procedure, and the exclusionary rule. Currently, all of the "rules" are cast in terms of the Constitution, because the Supreme Court, at least in the 1960s, evidently assumed that it had no power to make rules except to claim that each rule was based directly on the Constitution. Thus *Miranda* and its list of things that police must say to suspects before any interrogation, which came as close to pure rulemaking as the Supreme Court ever has, was based directly on the Fifth Amendment.

What I propose here is that the Supreme Court forthrightly recognize—as it essentially did in *Dickerson v. United States*¹²⁸ concerning *Miranda*—that it can make prophylactic rules that advance constitutional rights without declaring that every violation of the rules necessarily violates the Constitution. Thus, as *Dickerson* conceded, "the *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself."¹²⁹ *Dickerson* was followed by *United States v. Patane*,¹³⁰ in which the Court held that a presumptively improper failure to give the *Miranda* warnings when the defendant asserted that "I know my rights" would not require the exclusion of a gun found as a fruit of the defendant's statement because the *Miranda* violation did not violate the Constitution directly the way an involuntary confession would have.

Fourth Amendment analysis would be similar under this proposal, but would focus, as the Supreme Court insists it should, on police culpability. Each case would require two inquiries: First, whether the police broke the Supreme Court's prophylactic rules as to search and seizure. If they did, then second, whether the prosecutor can establish that this violation was nonnegligent—similar to the harmless-error rule, although the breach need not be "harmless," just not negligent.¹³¹

126. As *Arizona v. Evans*, 514 U.S. 1 (1995) seemed to do in refusing to exclude evidence when a mistake had been made in the clerk of court's office.

127. *Herring v. United States*, 129 S. Ct. 695, 708 (2009).

128. 530 U.S. 428 (2000).

129. *Id.* at 441 (quoting *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (refusing to apply the Fourth Amendment's fruit-of-the-poisonous-tree doctrine to *Miranda* violations)); accord *United States v. Patane*, 542 U.S. 630, 639 (2004) (stating *Miranda* is a "prophylactic rule").

130. 542 U.S. at 635.

131. I do not see the need for a further two-stage discussion of fruit of the poisonous tree. If a given seizure was unreasonable, it would likewise be unreasonable to use the fruits.

This approach is not terribly different from that taken by Judge Friendly in his article *The Bill of Rights as a Code of Criminal Procedure*,¹³² discussed by the majority in *Herring*.¹³³ Friendly argues that there should be a “penumbral zone where mistake will not call for the drastic remedy of exclusion.”¹³⁴ However, under my approach, the “penumbral zone” would be considerably smaller, calling for exclusion when the police mistake is negligent (lots of cases), rather than when it is “intentionally or flagrantly illegal” (very few cases).¹³⁵

A prosecutor could prevail under this approach in several classes of cases, even if a constitutional violation were found. The first would be, as in *Gant*, when the police were following Supreme Court precedent that the Court has now determined to change.¹³⁶ This is the approach taken by Canada, and its basic “reasonableness” can hardly be disputed.¹³⁷ There is simply no police misconduct to deter.

The second would be when, as in *Minjares*, the law was unclear but the police were reasonable in choosing the course of action that they did. Another such case is *Kyllo v. United States*,¹³⁸ in which police, in beaming an electronic heat sensor at a home without a warrant, were acting in uncharted territory, legally speaking. The Supreme Court, by a five-to-four vote concluded that this police action was improper. Clearly these police did not deserve to be “punished” for their initiative, yet current exclusionary law presents no alternative to exclusion when a violation is found. After *Kyllo*, of course, with the law now established, police failure to abide by that ruling would be “unreasonable.” Courts would have to decide in each case whether police use of various surveillance methods on houses was consistent with *Kyllo*, and, if not, whether the police error was reasonable or not.

The third class of cases would be those in which the police miscalculated a factual matter, such as exigent circumstances to search without a warrant, or

132. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

133. *Herring*, 129 S. Ct. at 702.

134. Friendly, *supra* note 132, at 953.

135. *Id.* at 952.

136. *Chimel v. California*, 395 U.S. 752 (1969) (changing the rules for searches incident to arrest in homes). See also *Katz v. United States*, 389 U.S. 347 (1967), in which the police’s warrantless bugging of a phone booth was held proper under *Olmstead v. United States*, 277 U.S. 438 (1928).

137. I see no serious “case or controversy” problem here. It is true that if the Court declares a new rule, the defendant will be unsuccessful in getting the evidence excluded in this case. But defendants will claim that the police conduct was negligent and argue that existing precedent can be distinguished, as did the defendant in *Gant*. The Court can declare new rules even if the defendant did not ask for them. The Court could then reject the defendant’s claim that the police were “negligent” in this case. Although this will be unsatisfying to defendants, there is still a “case or controversy” over the two issues of whether there was a rule violation in this particular case and whether the police were negligent such as to violate the Fourth Amendment. See *Safford United Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009), in which the Court found a Fourth Amendment violation due to a search at school but then denied relief because the principal was not unreasonable in ordering the search. The Court’s current approach under *Herring* presents the same problem.

138. 533 U.S. 27 (2001).

probable cause to search an automobile. This would, in effect, embody a “reasonable good faith” exception in nonwarrant cases, a notion that was much maligned by academic commentators before *United States v. Leon*.¹³⁹ This proposal is a compromise between the mandatory rule, the essentially “non-exclusionary rule” set forth in *Herring*, and the rule that the negative effect on some defendants will be lessened by placing the burden of proof on the government. *Spinelli v. United States*, in which the Court concluded, by a five-to-three vote, that the evidence in a warrant application was not sufficient to add up to probable cause,¹⁴⁰ exemplifies such a case in which evidence likely would not be excluded under my proposal. Because the police were wrong but not “unreasonable” in *Spinelli*, the evidence would be admitted.

This negligence proposal is based on “reasonable good faith” with the emphasis on the “reasonable” or nonnegligent aspect of police behavior.¹⁴¹ “Good faith” is added because a police officer’s objectively reasonable belief that he has probable cause should not excuse his conduct if he does not also subjectively believe that probable cause is present.¹⁴² This will not change many results in actual cases, because, despite current law, courts usually deny motions to suppress in serious cases,¹⁴³ except, presumably, when the police misbehavior is blatant.

These are new categories of nonexclusion under my proposal. They do not include the two previous categories set forth in Justice Breyer’s dissent in *Hudson*: mistakes by someone other than police— (for instance, a magistrate, the legislature, or a court clerk)¹⁴⁴ on which the police relied in good faith, and use of evidence in fora other than a criminal trial (such as a deportation hearing or probation revocation hearing).

These categories of nonexclusion do not include behavior such as that in *Hudson*, in which the police at least recklessly, if not purposely, broke the

139. See articles cited in *United States v. Leon*, 468 U.S. 897, 916 n.14 (1984). To some extent these criticisms were satisfied by the Court’s inclusion of a requirement that the violation be both “reasonable” and in good faith, a requirement that I reiterate here.

140. 393 U.S. 410, 419 (1969).

141. As Jerold Israel pointed out in an article quoted in *Leon*,

The key to the [exclusionary] rule’s effectiveness . . . lies, I believe, in the impetus it has provided police training programs. . . . [An objective good faith exception] is not likely to result in the elimination of such programs, which are now viewed as an important aspect of police professionalism. Neither is it likely to alter the tenor of those programs; the possibility that illegally obtained evidence may be admitted in borderline cases is unlikely to encourage police instructors to pay less attention to fourth amendment limitations.

Jarod H. Israel, *Criminal Procedure in the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1412 (1977) (quoted in *Leon*, 468 U.S. at 919 n.20). By contrast, the recklessness standard proposed in *Herring* would encourage ignorance of the rules and thus discourage police training.

142. See Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L.J. 339 (2006) (making this point in detail).

143. Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 83 (1992).

144. And now, as *Herring* has held, a police clerical worker, at least from another police department.

“knock and announce” rule. It would have been a simple matter for the police to establish their belief that such a knock and announce would have been “dangerous or futile,” but they did not. If the Court had concluded in *Hudson* that the rule should never have been part of the Constitution in the first place, it should have overruled *Wilson v. Arkansas*,¹⁴⁵ which first included “knock and announce” as a Fourth Amendment right. Instead, the Court insisted that an unannounced intrusion was still a constitutional violation but the evidence would not be excluded. *Hudson* is inconsistent with the Court’s later attempt in *Herring* to base exclusion on the culpability of the police.

This proposal produces similar results to the Court’s current analysis of civil suits based on constitutional violations under 18 U.S.C. § 1983. First, under the formula established in *Saucier v. Katz*,¹⁴⁶ a trial court should consider whether there was a constitutional violation but then give the officer immunity if “the officer’s mistake as to what the law requires is reasonable.”¹⁴⁷

This is illustrated by the recent “strip search” decision of *Safford United School District #1 v. Redding*.¹⁴⁸ In *Redding*, the Court ruled that a strip search of a junior-high student for prescription drugs was a violation of the Fourth Amendment. But the Court then held that the principal who ordered the search was entitled to qualified immunity because “clearly established law [did] not show that the search violated the Fourth Amendment.”¹⁴⁹ The Court further noted that “even as to action less than an outrage ‘officials can still be on notice that their conduct violates established law . . . in novel factual circumstances.’”¹⁵⁰ This sounds very similar to my proposal for exclusion.

Although the Court’s formulation reaches the same result as that I propose, it also puts the Court in the uncomfortable position of declaring that a search is simultaneously “unreasonable” (because it violates the Fourth Amendment) and “reasonable.” It would be much more straightforward for the Court to say to say that the strip search violated our Fourth Amendment based rules, so the police cannot do it again, but because of the uncertainty of the law at the time of the violation, the police acted reasonably.

This proposal will work for the Fifth Amendment as well as for the Fourth, even though the Fifth does not include the helpful reasonableness standard. Ordinarily, the failure to give the *Miranda* warnings prior to a custodial interrogation is negligent, and subsequent statements by the suspect would have to be suppressed. In some situations, however, the applicability of *Miranda* may

145. 514 U.S. 927, 929 (1995).

146. 533 U.S. 194 (2001).

147. *Id.* at 205. Or, under *Pearson v. Callahan*, 129 S. Ct. 808 (2009) this analysis can be done in reverse order. *Pearson* overruled the mandatory order of the *Saucier* protocol, allowing courts to dispose of cases on qualified immunity grounds without discussing the alleged constitutional violation. *Id.* at 818–20.

148. 129 S. Ct. 2633 (2009).

149. *Id.* at 2643.

150. *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

be in doubt. For example, in *United States v. Patane*, the policeman started to warn the defendant of his rights, and the defendant interrupted, declaring that he knew his rights. The policeman then did not finish reading the rights.¹⁵¹

The Supreme Court assumed that the truncated reading violated *Miranda* in order to reach defendant's fruit of the poisonous tree argument (which the trial court had sidestepped by ruling a gun Patane had later shown the police had been seized without probable cause). The Court assumed that Patane's statement, had it been offered, would have to have been excluded so as not to comprise testimony against himself, but the gun he led them to was admissible. Under my approach, a court could well conclude that although the policeman should have given the full warnings to Patane, his failure to do so was not negligent. Accordingly, Patane's statement would have been admissible, even though in future cases, with the rule now clearly established, failure to warn would be negligent.

Likewise, in *Oregon v. Elstad*,¹⁵² the police failed to warn a youthful suspect who was being questioned in his living room by a single policeman with his mother nearby. The Court assumed that this was a custodial interrogation and therefore that his statements in the house (but not subsequent statements) must be excluded. A better resolution would have been to conclude, as the Court did, that even though the interrogation was custodial, the police mistakenly, but reasonably, treated it as noncustodial; therefore, his initial statement would be admissible. *Miranda* itself involved a brief interrogation of a rape suspect¹⁵³ that, by pre-*Miranda* standards, could in no sense be deemed "unreasonable."

Once it is determined that police failure to warn is unreasonable; however, the Court's tortured gyrations to get around the fruit of the poisonous tree rule should likewise be abandoned. The fruits of poisonous trees, when those trees are unreasonable police behavior, should never be admissible. Much of the reasoning in *Elstad* seems aimed at establishing that the violation in that case wasn't really so bad and therefore shouldn't have "poisonous fruit" consequences. This proposed rule is much more straightforward: negligent violations never lead to evidence, whether direct or as fruits, that is usable in the prosecution's case in chief; nonnegligent violations always do.

It may be argued that this approach will make it too easy for trial judges to admit evidence. It will certainly make it easier, especially when the police are acting in situations where the law is unclear. But it will perhaps make it easier for courts to establish new rules to guide police in the future when doing so does not require letting this defendant go free. In any case, it is already easy enough for courts to refuse exclusion. They can, for example, declare that certain police activity that can only be described as a "search" is not technically

151. 542 U.S. 630 (2004).

152. 470 U.S. 298 (1985).

153. *Miranda v. Arizona*, 384 U.S. 486 (1966).

a search under the Fourth Amendment.¹⁵⁴ Or they can find exigent circumstances when a reasonable person would not see them. Or they can allow an auto search on what certainly does not seem like probable cause. The fact is, one way or another, courts already apply a “reasonableness” standard. Why not be forthright about it?

VII

CONCLUSION

In sum, this article reconceives the exclusionary rule as applying to only those situations in which the police have violated the Fourth Amendment by acting “unreasonably.” But “unreasonableness” is determined case by case, rather than by categories of cases (searches of houses, searches of cars, et cetera) as the Court does it now. This proposal presents a two-pronged approach to exclusion. First, the defendant must establish that the Fourth Amendment rules were broken. Second, to avoid exclusion, the government has the opportunity to prove that the rule violation was not negligent. This is essentially the same as the approach applied to qualified-immunity issues in civil cases alleging constitutional violations. When the police are relying on Supreme Court precedent, when the law is simply undecided, or when the facts lead the courts to conclude that, though the police acted wrongly, their mistake was a reasonable one, the evidence should not be excluded.

This proposal also applies to the Fifth Amendment. Ordinarily, failure to give the *Miranda* warnings to a suspect in custodial interrogation is an unreasonable or negligent violation, and any statement that the suspect makes, as well as its fruits, should be suppressed. But it is easy to imagine situations, such as those presented by *Patane* and *Elstad*, in which it is unclear whether the suspect was in custody or the warnings were otherwise required. In such cases, the police failure to warn could be considered wrong but reasonable, and the statement, and its fruits, should not be suppressed.

154. For cases in which searches are not such for purposes of the Fourth Amendment, see for example, *California v. Greenwood*, 486 U.S. 35 (1988) (searches of trash) and *Oliver v. United States*, 466 U.S. 170 (1984) (searches of fenced and posted fields). See also Orfield, *supra* note 143.